Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1933

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEE T. WESLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was prejudiced by an immaterial allegation in the indictment and that the doctrine of collateral estoppel barred certain charges against him.

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on three counts of misapplying federal funds, in violation of 42 U.S.C. 2971(f), and on one count of conspiracy to misapply federal funds and to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to two years' probation. The court of appeals affirmed (Pet. App. A).[2]

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[1]Petitioner's co-defendant, Kent J. Smith, was also an appellant in the court of appeals but has not joined in this petition.

[2]The judgment of the court of appeals was entered on March 21, 1980. On April 29, 1980, Mr. Justice Powell entered an order

1. Petitioner and co-defendant Kent Smith were originally indicted in the United States District Court for the Middle District of Louisiana in a six-count indictment alleging conspiracy and five substantive offenses. Following a jury trial, petitioner was convicted on all counts except count 6 (charging misapplication of federal funds in connection with certain payments for computer paper). Co-defendant Smith was convicted on all counts except count 2 (charging misapplication of federal funds in connection with certain payments for printing services). The verdicts were set aside and a new trial granted due to misconduct by the prosecutor during closing argument. The government thereafter obtained a superseding indictment, which added certain allegations to the conspiracy count pertaining to the conspirators' motive. In conformity with the jury's verdict in the first trial, petitioner's name was stricken from count 6 and co-defendant Smith's name was stricken from count 2 of the superseding indictment. The district court also struck petitioner's name from those portions of the conspiracy charge that alleged overt acts relating to the offense charged in count 6 of the indictment. It also struck co-defendant Smith's name from those portions of the conspiracy charge that alleged overt acts relating to the offense charged in count 2.

2. The evidence at the second trial showed that petitioner, the executive director of a federal anti-poverty agency in East Baton Rouge Parish, Louisiana, conspired with co-defendant Smith, his administrative assistant, and Henry Baptiste, an unindicted co-conspirator, to misapply federal funds for the personal benefit of Baptiste (Tr. 187,

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extending petitioner's time for filing a petition for a writ of certiorari to and including May 20, 1980 (Pet. App. B). The petition was filed on June 9, 1980. It was therefore substantially out of time under former Rule 22(2) of the Rules of this Court.

383, 1123). Baptiste provided certain photographic and printing services for the agency and also provided computer paper. Baptiste's prices were inflated, the awards he received were made without competitive bidding as required under the agency's rules, and the payments to Baptiste were made in preference to other creditors with prior claims. Baptiste subcontracted the work to other companies, and provided services and materials that were seriously deficient in quality. Some of the work was totally useless, and in one case Baptiste was paid for work that was not performed at all (Tr. 194-197, 219-221, 252-258, 263-266, 330-332, 398, 940-956, 977, 1006, 1023, 1028, 1038, 1062).

3. Petitioner argues (Pet. 9-12) that the district court should have stricken certain new allegations added to the conspiracy count of the superseding indictment. The new allegations, bearing on the intent of the conspirators, charged that petitioner received his appointment as executive director of the federal anti-poverty agency through the assistance of two state legislators. It was also alleged that funds from the bank account of Baptiste's company were used to make partial payment on four bank notes on which Baptiste and the two legislators were obligors. The government's theory at trial was that petitioner had a motive to divert funds for Baptiste's benefit so that Baptiste, in turn, would make good petitioner's "political debt" to the legislators. Petitioner argues that these allegations were immaterial and prejudicial and should have been stricken.

However, it is well established that a motion to strike immaterial matter from the indictment is addressed to the sound discretion of the district court and that the district court's ruling will be reversed only upon a clear showing of abuse of discretion. *United States* v. *Courtney*, 257 F.2d 944, 947 (2d Cir. 1958), cert. denied, 358 U.S. 929

(1959); *Dranow* v. *United States*, 307 F.2d 545, 558 (8th Cir. 1962); *United States* v. *Bullock*, 451 F.2d 884, 888 (5th Cir. 1971); *United States* v. *Kemper*, 503 F.2d 327, 329 (6th Cir. 1974), cert. denied, 419 U.S. 1124 (1975); *United States* v. *Poore*, 594 F.2d 39, 41 (4th Cir. 1979); see also *United States* v. *Davis*, 418 F.2d 59, 63-64 (9th Cir. 1969). No abuse of discretion occurred here. The new allegations were material to the conspiracy charged in the superseding indictment. They tended to establish that petitioner and his co-defendant had a motive to misapply federal funds. It was permissible for the government to attempt to show the reason why petitioner and Smith committed acts that were apparently for the sole benefit of Baptiste. Whether the evidence sustained the government's theory was for the jury to decide. Rather than prejudicing petitioner, these allegations apprised him in advance of the government's theory at trial. See *Boushea* v. *United States*, 173 F. 2d 131, 132-133 (8th Cir. 1949).

4. Petitioner also argues (Pet. 13-18) that, by acquitting him on count 6 and co-defendant Smith on count 2 of the original indictment, the jury necessarily found that the acts upon which those substantive counts were based were not committed "in furtherance" of the conspiracy charged in count 1 of the indictment. He further contends that principles of collateral estoppel barred the government from alleging in the superseding indictment that those acts were overt acts in furtherance of the conspiracy.

However, the doctrine of collateral estoppel is a bar to a second prosecution only if "[t]he single rationally conceivable issue in dispute before the jury" was resolved adversely to the government in the first trial. *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). Collateral estoppel does not apply if "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from [subsequent] consideration." *Id.* at 444. See also *United States* v. *Ballard*, 586 F.2d 1060,

1064-1066 (5th Cir. 1978). In the present case, there is no basis for inferring from the jury's verdict in the first trial that the jury believed that the acts in question (purchasing goods and services from Baptiste) were not overt acts in furtherance of the conspiracy.

The jury convicted petitioner on count 2 of the original indictment but acquitted co-defendant Smith; the jury convicted co-defendant Smith on count 6 of the original indictment but acquitted petitioner. Thus, the jury believed that the acts underlying counts 2 and 6 were performed by one of the co-conspirators, but not both. That finding is not inconsistent with the view that the acts were overt acts in furtherance of the conspiracy.[3] The jury's verdict, convicting only one defendant on both counts 2 and 6, does not suggest that the acts underlying those counts were not overt acts performed in furtherance of the conspiracy because "the overt act * * * need not involve more than one of the conspirators." *United States* v. *Bass*, 472 F.2d 207, 213 (8th Cir. 1973).[4] Thus, the

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[3]Petitioner argues (Pet. 15) that the jury must have believed that the acts charged in counts 2 and 6 were not "in furtherance of the unlawful conspiracy" because the jury *could* have convicted both defendants on those counts if the acts were in fact in furtherance of the conspiracy. See *Pinkerton* v. *United States*, 328 U.S. 640, 645-646 n.6 (1946). The short answer to this argument is that, although the government requested a *Pinkerton* charge during the first trial, the district court did not give it. Moreover, although a *Pinkerton* charge would have permitted a conviction of co-conspirators of substantive offenses on a theory of vicarious liability, it would not require such a conviction. In sum, the first jury, in passing on counts 2 and 6, did not necessarily arrive at any conclusion regarding their nexus to the conspiracy.

[4]Moreover, counts 2 and 6 of the original indictment charged that the defendants "willfully" defrauded the government by misapplying federal funds. The overt acts in the conspiracy count of the superseding indictment were not themselves alleged to be willful violations of substantive law. See *United States* v. *Bass*, *supra*, 472

jury's acquittal of one defendant on count 2 and one on count 6 was not tantamount to a determination in petitioner's favor "upon an issue * * * that [he] seeks to foreclose from [subsequent] consideration." *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444.

In any event, viewed in context, any error in failing to strike the overt acts in question from the conspiracy count of the superseding indictment was harmless. Petitioner and his co-defendant were convicted on counts 3, 4 and 5 of the superseding indictment, which alleged acts that were also charged as overt acts in the conspiracy count. Thus, there is no realistic possiblity that the jury would have found an absence of overt acts and acquited petitioner on the conspiracy count if the overt acts relating to counts 2 and 6 had been withdrawn from their consideration.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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F.2d at 213 ("The overt act need not be criminal in nature"). For this reason, an acquittal on the substantive counts is not equivalent to a determination that the acts underlying the substantive counts were not overt acts in furtherance of the conspiracy. See *United States* v. *Romeros*, 600 F. 2d 1104, 1105 (5th Cir. 1979).

[5]We also note that petitioner received concurrent two-year sentences of probation on the conspiracy count and the substantive counts. For this reason, review by this Court of petitioner's conspiracy conviction is unnecessary. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976). Even if petitioner's conspiracy conviction were reversed, that would not affect his sentence and would not have any collateral consequences.

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